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IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

Exceptions of the State of California to the Report of the Special Master Dated October 14, 1952, Pursuant to Court Order of December 2, 1963.

Introductory Statement

The State of California excepts to the Report of the Special Master dated October 14, 1952, and to the recommendations and conclusions therein contained, as hereinafter specifically set forth. For the convenience of the Court, these exceptions on behalf of the State of California supersede and replace its previous exceptions filed in the October Term, 1952. This document contains those exceptions previously filed which are presently urged by the State and additional exceptions in accordance with the Court's order dated December 2, 1963.

California has abandoned its former exceptions to the Special Master's conclusion that the questions involved in this proceeding are justiciable (Rep. p. 6, n. 6) and to the Special Master's failure to hold that the questions involved cannot be determined without action by Congress. (California's January 9, 1953 Exceptions to Report of Special Master dated October 14, 1952, I A & B.)

CALIFORNIA'S EXCEPTIONS

I

California Excepts to the Special Master's Basic Assumption (Rep. pp. 6, 9) With Which California Formerly Agreed (California Brief of July 31, 1951, p. 11) That the Determination of the Demarcation Line at Which Inland Waters End and the Marginal Sea Begins "Involves a Question of the Territorial Jurisdiction of the United States as Against Foreign Nations, i.e., a Question of External Sovereignty."

A. California excepts to the Special Master's statement (Rep. p. 6), predicated on his erroneous basic assumption that the question was one of external sovereignty, that appropriate answers to the questions presented depend on "(1) any customary, generally recognized rule of international law . . . . or . . . (2) effective assertion by the United States on its own behalf in its international relations."

B. California excepts to the Special Master's refusal (likewise predicated on said erroneous basic assumption) to consider the relevance of California's historic boundaries, other than in the context of United States foreign relations (Rep. pp. 6, 9, 35), and the correlative assumption by the Special Master that rights to historic waters depend only on United States' assertions of right. (Rep. pp. 6, 9, 30, 34, 35, 37, 38.)

C. California excepts to the Report on the basis of the impossibility of the Special Master's considering the drastic effect on his aforesaid erroneous basic assumption of the following factors:

(1) The passage of the Submerged Lands Act of 1953 (67 Stat. 29; 43 U.S.C. §§ 1301-15) which had the effect of transforming the question from one involving the delimitation of the external line of the marginal belt as against foreign nations to a solely domestic question, unaffected by past Executive action, involving the division of the continental shelf between the United States and the State;

(2) The legislative history of the Submerged Lands Act, and judicial decisions construing said Act, which establish that the intent of Congress by said Act was to restore to the states ownership and control of the continental shelf within the states' territorial boundaries;

(3) The doctrine that the right to exercise jurisdiction and control over the seabed and subsoil of the continental shelf does not depend on the boundary of territorial waters but, when necessary, may be drawn beyond the limit of those waters, since such a domestic question of delimiting the respective spheres of jurisdiction in the submerged lands of the continental shelf could not affect in any way our relations with foreign nations. *United States v. Louisiana,* 363 U.S. 1, 35-36 (1960).

II

California Excepts to the Special Master's Conclusions Regarding the Content as Well as the Relevance of International Law Principles as Applied to the Basic Dispute.

In this connection, California excepts to:

A. The Special Master's holding that the Executive has in the past (prior to 1952) taken a consistent and uniform position or a "traditional" position (Rep. pp. 21, 27, 36) which provides criteria for the fixing of the baseline of the marginal belt;

B. The Special Master's statements (Rep. pp. 7, 8, 9), valid at the time but no longer correct, that there did not exist any customary, generally recognized rule of international law that established as a matter of common right the criteria by which the baseline of the marginal belt is to be located, especially in view of: (1) the United States' subsequent adoption and ratification of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L. 52) which contains precise rules for the delimitation of the boundaries between internal and territorial waters; (2) subsequently expressed policy of the Secretary of State; and (3) extensive post-report studies dealing with many of the questions before the Special Master and currently recognized as definitive statements of international law principles.

C. To the Report on the basis of the impossibility of the Special Master's considering the international law developments and studies referred to in part "B" of this Exception.

III

California Excepts to the Special Master's Statement That He Was Concerned With United States Policy as of October 28, 1947 When the Decree in This Case Was Entered (Rep. p. 22) Rather Than the Date of the Supplemental Decree, Which California, Along With the United States (See Brief of the United States Before the Special Master, p. 163, et seq.), Agrees Should Be Determinative.

IV

California Excepts to the Special Master's Conclusion (Rep. pp. 2, 3, 29) That the Channels and Other Water Areas Between the Mainland and the Offshore Islands Are Not Inland Waters.

In this connection, California excepts:

A. To the Special Master's conclusion (Rep. pp. 26, 27, 29) that it is and has traditionally been the position of the United States that the baseline of the marginal belt ignores islands and follows the sinuosities of the coast line except where interrupted by bays not more than ten miles across;

B. To the failure of the Special Master to find that under *Manchester v. Massachusetts,* 139 U.S. 240 (1891), a state can define its boundaries on the sea, subject to general limitations imposed by international law;

C. To the Report on the basis of the impossibility of the Special Master's considering the effect of the United States' ratification of Article 4 of the 1958 Geneva Convention as a codification of the *Anglo-Nor-*

wegian Fisheries Case (*United Kingdom v. Norway* [1951] I.C.J. Rep. 116), the impossibility of the Special Master's considering any evidence as to United States policy subsequent to such ratification, and the impossibility of the Special Master's considering the effect of state actions in light of such ratification, under the principles of *Manchester v. Massachusetts, supra;*

D. To the Report on the basis of the impossibility of the Special Master's determining the effect of said ratification of Article 4 of the 1958 Geneva Convention upon California's claim to areas landward of an offlying fringe of islands such as the Santa Barbara Channel;

E. To the Special Master's finding that the Santa Barbara Channel connected two areas of open sea and to his failure to find that said Channel could be considered historic inland waters;

F. To the Special Master's failure to find that the channels between the offshore islands and the mainland in the so-called "unit area" claimed by California are historic inland waters;

G. To the Special Master's finding (Rep. pp. 3, 27) that the channels between the offshore islands and the mainland in the so-called "unit area" claimed by California connect two areas of open sea.

V

California Excepts to the Special Master's Conclusion (Rep. p. 3) That No One of the Seven Coastal Segments Under Consideration Is a Bay Contituting Inland Waters.

In this connection California excepts to:

A. The Special Master's conclusion (Rep. pp. 3, 21) that the position of the United States is, and traditionally has been, that the baseline of the marginal belt follows the sinuosities of the coast except that the baseline is a straight line drawn across the opening of bays, gulfs, or estuaries not more than ten miles wide or, where such opening exceeds ten miles in width, at the first point therein where their width does not exceed ten miles;

B. The Special Master's conclusion (Rep. p. 21) that the United States has not in its international relations asserted the criteria proposed by California or any criteria that would mark as inland waters any greater water area on the coast of California than was conceded by the United States in this case;

C. The Special Master's conclusion (Rep. pp. 23-26) that only "deep" bays can qualify as inland waters;

D. The Special Master's view (Rep. pp. 3, 26) that the Bogys Formula should be accepted as the method for determining whether a coastal indentation is "deep" despite his conclusion that the Boggs Formula does not represent the present or traditional definitive position of the United States and despite his conclusion (Rep. pp. 7, 29, 40-43) that his responsibility is not to determine what *should* be the policy of the United States;

E. Any implication in the Special Master's Report (Rep. pp. 25, 26) that application of the Boggs Formula does not affect the status of any of the segments at issue.

VI

California States Its Position In Respect to the Special Master's Recommendations as to Harbors (Rep. pp. 4, 47-48) as Follows:

A. California agrees with the Special Master's recommendation that "in front of harbors the outer limit of inland waters should embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port," and California agrees that this line "may be assumed to be the line of the outermost harbor works" (Rep. pp. 4, 46-48); but California excepts to that portion of the Special Master's recommendation which implies that contrary evidence might be used to establish a line landward of the outermost harbor works. (Rep. pp. 4, 48.)

B. California excepts to the Report on the basis of the impossibility of the Special Master's considering either the effect of the ratification of Article 8 of the 1958 Geneva Convention (which specifically provides that the baseline of a territorial sea shall be drawn from the "outermost permanent harbor works"), or the intent of Congress in enacting the Submerged Lands Act.

C. California excepts to the implication that the Special Master's conclusion regarding harbors determines the extent of inland waters in any area embraced within the coastal segments considered, for the reason that all the harbors here under consideration are either within bays or other larger areas which, of themselves, constitute inland waters.

VII

California States Its Position With Respect to the Special Master's Recommendation Under the Heading "Low Water Mark" (Rep. pp. 39-46) as Follows:

A. California excepts to the Special Master's recommendations that the "ordinary low water mark on its coast" be "the intersection with the shore line of the plane of the mean of all low waters" (Rep. pp. 4, 5), rather than the plane of the mean of the lower low waters.

B. California agrees that the "ordinary low water mark" is to be established "as it exists at the time of the survey" (Rep. p. 4) and not as it may have been in 1850. (Rep. p. 45.)

C. California excepts to the Report on the basis of the impossibility of the Special Master's defining, in accordance with Article 3 of the 1958 Geneva Convention the phrase "ordinary low water mark," as well as the term "line of ordinary low water" (as used in the Submerged Lands Act), to mean the plane of the mean of the lower low waters since this plane is the one marked on large scale charts officially recognized by the United States as well as the State of California.

D. California excepts to the Special Master's statement (Rep. p. 42) that it is only a matter of convenience to navigators that limits of the marginal belt are measured from the low water mark based on the mean of the lower low waters as shown on these charts.

VIII

California Excepts to the Special Master's Conclusion That the Waters of the Seven Coastal Segments Under Consideration Are Not Historic Inland Waters.

In this connection, California excepts to:

A. The Special Master's express assumption (Rep. pp. 9, 30, 35, 37, 39) that the establishment of historic inland waters depends on an assertion of right by or on behalf of the United States and the Special Master's consequent failure to hold (Rep. p. 39) that usage and occupancy by a state and its people can establish waters as historic inland waters.

B. The Special Master's conclusion (Rep. p. 30) that the United States has never exercised exclusive jurisdiction over the water areas involved, despite the positive position supporting California's contentions taken in the *amicus* brief filed on behalf of the United States and at the express direction of the United States Attorney General in *People v. Stralla,* 14 Cal.2d 617, 96 P.2d 941 (1939), the federal court cases of *United States v. Carrillo,* 13 F. Supp. 121 (S.D.Cal. 1935) and *Ocean Industries v. Greene,* 15 F.2d 862 (N.D.Cal. 1926), declaring the inland waters status of the respective areas involved, the provisions of various acts of Congress, the reports of the United States Corps of Engineers and of special boards, and other matters.

C. The Special Master's statements (Rep. p. 34) that the rationale of the decisions in *Ocean Industries v. Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927), *Ocean Industries v. Greene, supra, People v. Stralla, supra,* and *United States v. Carrillo, supra,* is in direct conflict with the traditional and present position of the United States.

D. The Report on the basis of the impossibility of the Special Master's considering the effect on the doctrine of historic inland waters of the 1958 Geneva Convention, and comprehensive international law studies including a study on "Historic Bays" (U.N. Doc. A/Conf. 13/1) dated September 30, 1957 and one entitled "Juridical Regime of Historic Waters, Including Historic Bays" (U.N. Doc. A/Conf. 4/143) dated March 9, 1962.

E. The Special Master's conclusions (Rep. p. 35) that the assertions of right in *Ocean Industries v. Superior Court, supra* (enforcement of fishing laws), and *People v. Stralla, supra* (enforcement of criminal laws), did not constitute "an assertion of exclusive authority over these waters such as might be the occasion for objection by foreign governments or action by the United States in our international relations," and that "absence of objection from foreign countries cannot be regarded as acquiescence in the position of California, nor . . . could silence on the part of the United States be interpreted as a concurrence by the United States in its foreign relations with the proposition on which California stood in these cases."

F. The Special Master's conclusion (Rep. pp. 31, 38, 39) that California made no explicit assertion of exclusive authority over the water areas in dispute before 1949.

G. The Special Master's statement (Rep. pp. 37-38) that assertions of exclusive control of the waters off the shore of California by Spain in the 18th Century and by Mexico in the first part of the 19th Century have no present significance.

H. The Special Master's refusal (Rep. pp. 37-39) to consider as relevant historic evidence in connection with the establishment of the State's boundaries both prior to admission and at the time of admission into the Union, especially the significance of California's 1849 Constitutional Convention and its 1849 Constitution as approved by the California Admission Act of September 9, 1850 (9 Stat. 452).

I. The Special Master's recommendation (Rep. p. 36) that if San Pedro Bay constitutes inland waters, the contention of the United States as to the location of the southeastern headland of the Bay should be accepted.

J. Any implication from the Special Master's statements (Rep. pp. 30-39) that the doctrine of historic inland waters relates only to bays rather than to all waters which can form a part of the maritime domain of a state, including such areas as the Santa Barbara Channel.

Respectfully submitted,

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Dated: April 1, 1964.